

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

_____)	
UNITED STATES OF AMERICA and)	
STATE OF FLORIDA,)	
)	
Plaintiffs,)	
)	
v.)	Civil Action No. 94-748-CIV-T-23E
)	Judge Steven D. Merryday
MORTON PLANT HEALTH SYSTEM, INC. and)	
TRUSTEES OF MEASE HOSPITAL, INC.,)	
)	
Defendants.)	
_____)	

**MEMORANDUM OF THE UNITED STATES AND THE STATE OF FLORIDA IN
SUPPORT OF THE MOTION AND STIPULATION FOR ENTRY OF AN
ENFORCEMENT ORDER**

The Motion and Stipulation for Entry of an Enforcement Order filed today is the result of an investigation by the Antitrust Division of the United States Department of Justice (the “Antitrust Division”) and the State of Florida into allegations that Morton Plant Hospital Association, Inc., formerly known as Morton Plant Health System, Inc. (“Morton Plant”), and the Trustees of Mease Hospital, Inc. (“Mease”) were violating the Final Consent Judgment (“FCJ”) entered by this Court on September 29, 1994. This investigation demonstrated that, starting shortly after the entry of the FCJ and continuing for nearly the entire five years since, Morton Plant and Mease violated the FCJ by coordinating the negotiation and sale of inpatient and outpatient services, by using the partnership allowed by the FCJ to jointly sell services to managed care companies and others, and by failing to satisfy the requirements of the FCJ’s compliance

program. These violations were serious, substantial, and repeated.

Morton Plant and Mease have now admitted these violations and have agreed to entry of the proposed Enforcement Order. *See* Motion and Stipulation for Entry of an Enforcement Order (“Motion and Stipulation”), ¶ 1. That Enforcement Order imposes a penalty of nearly \$500,000 in costs and penalties, and requires that both Morton Plant and Mease take various affirmative steps to prevent the recurrence of these violations. These steps include the sale of the partnership’s outpatient clinics, Mease’s withdrawal from a local network of hospitals to which Morton Plant belongs, allowing payers who may have been injured by these violations an opportunity to terminate existing contracts, and the creation of a more rigorous compliance program -- one that makes each hospital’s chief administrative officer (“CAO”) directly responsible for the disclosure of any future violations. For these reasons, the plaintiffs request that the Motion be granted and that this Court enter the proposed Enforcement Order.¹

BACKGROUND

In 1994, Morton Plant, which operates Morton Plant Hospital, the largest and most prestigious general acute care hospital in northern Pinellas County, and Mease, which operates two hospitals -- Mease-Dunedin and Mease-Countryside, together the second largest hospital in the area -- announced their intention to merge. The Antitrust Division and the State of Florida filed an action seeking to enjoin the transaction, and subsequently entered into the FCJ with the

¹ Pending entry of the proposed Enforcement Order, Morton Plant, Mease, and Morton Plant Mease Healthcare (“MPMHC”) have agreed to be bound by its terms (except as otherwise provided). *See* Motion and Stipulation, ¶ 3. In the event that this Court declines to enter the proposed Enforcement Order, the proposed Enforcement Order shall be of no effect and the Motion and Stipulation shall be without prejudice to any party in this or any other proceeding. *Id.* at ¶ 4.

parties prohibiting the merger, but allowing the parties to jointly operate certain patient and non-patient services under specified conditions. The FCJ had a five year term, unless either plaintiff, in its sole discretion (but after consultation with the hospitals), extended it for an additional five years. On September 28, 1999, the plaintiffs notified the Court that they had exercised their right under the FCJ to extend the decree for another five years. It will now terminate on September 29, 2004.

While the FCJ prohibits the defendants from merging, consolidating, or combining their operations, except as otherwise expressly allowed, it permits Morton Plant and Mease to form a “bona fide partnership” to consolidate, jointly operate, and sell to the respective hospitals at cost: (i) certain patient care services, including outpatient and specific tertiary inpatient services;² and (ii) certain administrative services, including human resources, housekeeping, medical records, maintenance, information, and communications. FCJ at §§ V; II. All other services are deemed under the FCJ to be “Independent Services.”

The FCJ further provides that while Morton Plant and Mease may form the Partnership for the purpose of providing such services, the two hospitals (i) “shall continue as separate and competing corporate entities . . . and shall separately own and operate their respective Independent Services”; and (ii) each hospital “shall [] price and sell its services, both those owned and operated separately *and those purchased from the Partnership*, in active competition

² Under the FCJ, the hospitals may elect to “own, manage, operate or provide” through the partnership only the following “Patient Care Services”: outpatient services, open heart surgery (and related procedures), robotically assisted prosthetic implantation and special spinal instrumentation procedures, stem cell procedures, advanced linear accelerator equipment and procedures, stereo tactic radio therapy, diagnostic and therapeutic radiology services, laboratory services, mental health services, and home health, home infusion, rehabilitation, skilled nursing, and durable medical equipment (“DME”) services and equipment. (FCJ at §§ V; II(A).)

with each other.” *Id. at* § VI(A) and (B) (emphasis added). The FCJ further prohibits the hospitals from discussing, communicating, or exchanging with each other (or any other hospital) “information relating to the marketing, pricing, negotiating, or contracting of any patient care service, *including those purchased from the Partnership*” (*Id.*, emphasis added); and requires that the hospitals “negotiate and contract *independently* with health care purchasers such as Managed Care Plans.” *Id. at* § VI(D) (emphasis added).

The FCJ specifically prohibits the executives and board members of the Partnership from discussing Independent Services, managed care contracting for Morton Plant or Mease, or the pricing of the Partnership Services (with the exception of specified patient care services). *Id. at* § V(C). It also requires that the partnership establish adequate protections to keep information regarding pricing, managed care contracts, negotiations with managed care plans, and marketing and planning of Morton Plant and Mease separate, and to ensure that the information of one hospital is not transmitted to or received by the other hospital directly or indirectly. *Id. at* § V(I). Shortly after entry of the FCJ, Morton Plant and Mease created MPMHC as the “bona fide partnership” permitted by the FCJ.

In March 1998, the hospitals requested that the plaintiffs join them in a request to dissolve the decree due to “significant changes” in the market, particularly the increased competition from hospitals in Southern Pinellas County and throughout the Tampa area. More specifically, the defendants argued that the basis for the plaintiffs’ original concern -- that the hospitals competed in a “northern Pinellas County” market where they had little competition and that they competed “head-to-head” for managed care contracts -- no longer existed, and that a full merger of the two hospitals would no longer have anticompetitive effects.

The plaintiffs investigated these claims and concluded that what changes had occurred did not warrant an early termination of the FCJ. Indeed, the plaintiffs concluded that the FCJ should be extended for another five years. However, in the course of this investigation, the plaintiffs also discovered substantial evidence that Morton Plant and Mease had repeatedly violated the FCJ, starting shortly after its entry in late 1994. At no time did Morton Plant, Mease or MPMHC volunteer this information, though the evidence indicates that they were aware of the violations at the time that they requested early termination of the FCJ.

ARGUMENT

Both ¶ X of the FCJ and the Court's inherent authority give it jurisdiction for the purposes, *inter alia*, of enforcing compliance and punishing violations of the FCJ's provisions. The proposed Enforcement Order does both, and its entry would be in the public interest.

I. VIOLATIONS OF THE FCJ

Morton Plant and Mease, separately, together, and in conjunction with MPMHC, began to violate the FCJ soon after the date it was entered by this Court. More specifically, they repeatedly violated the provisions of the FCJ related to (i) the Partnership they were permitted to create, (ii) the prohibitions on coordination by the two hospitals, and (iii) the compliance requirements -- requirements intended to ensure that their activities comported with the FCJ's various prohibitions.

A. Violations Relating to the Partnership

Paragraphs V(A)-(B) of the FCJ permit Morton Plant and Mease to create a partnership to produce outpatient, specified inpatient, and certain administrative services. With limited

exceptions, the Partnership is required to sell all such services to Morton Plant and Mease exclusively, and the hospitals must then compete in the sale of these services to third parties, such as managed care plans. By requiring the Partnership to sell these services exclusively to Morton Plant and Mease for subsequent resale to third parties, the FCJ sought to ensure continued competition in the sale of these services despite their joint production.. Between 1994 and 2000, however, MPMHC violated the FCJ by selling these outpatient services directly to managed care plans and others, eliminating competition between the hospitals. Motion and Stipulation, ¶ 1. a (1).

Paragraph V(C) of the FCJ prohibits executives of the Partnership from discussing (with limited exceptions) managed care contracting or the marketing or pricing of any services for Morton Plant or Mease. The defendants violated this provision during various meetings in which MPMHC executives discussed managed care contracting with representatives of the hospitals. At several of these meetings, certain MPMHC executives gave identical instructions to each of the hospitals on managed care contracting goals and objectives, thereby coordinating Morton Plant's and Mease's managed care contracting activities in violation of the FCJ. *Id.* at ¶ 1. a (2)

Paragraph V(I) of the FCJ requires the Partnership to establish adequate protections to keep separate information concerning pricing, managed care contracts, negotiations with managed care plans, and marketing and planning of Morton Plant and Mease and to ensure that the information of one hospital is not transmitted to or received by the other hospital, whether directly or indirectly. On various occasions, however, MPMHC personnel violated the FCJ by transmitting information and recommendations on managed care contracting and pricing to both hospitals and coordinating the sale of services to various managed care plans. *Id.* at ¶ 1. a (3).

B. Violations Relating to “Independent Activities” of the Hospitals

Paragraph VI(A) of the FCJ requires Morton Plant and Mease to continue as separate and competing corporate entities, to market and price their services, as well as negotiate managed care contracts, independently. The hospitals, however, used MPMHC to share competitively sensitive information, coordinate managed care contracting decisions, and jointly sell certain services, all in violation of the FCJ. *Id.* at ¶1. b (1).

Paragraph VI(B) of the FCJ requires Morton Plant and Mease to price and sell their services, including those services produced by the partnership, in active competition with each other, and to independently market and price their services. With limited exceptions, they may not discuss, communicate, or exchange with each other information relating to the marketing, pricing, negotiating, or contracting of any patient or administrative services. However, the hospitals violated the FCJ by taking direction from MPMHC regarding the marketing and pricing of their services, by using MPMHC as a means of selling both inpatient and outpatient services jointly, and by sharing contracting information with each other, as well as with other hospitals in Pinellas County, through their participation in the BayCare Health Network, a local network of hospitals. *Id.* at ¶ 1. b (2).

Paragraph VI(D) of the FCJ requires Morton Plant and Mease to negotiate and contract independently with health care purchasers, though they are permitted to contract with the same purchasers and to enter into similar, but separate, contracts with these purchasers. However, on various occasions Morton Plant and Mease violated the FCJ by simultaneously negotiating identical contracts with the same managed care plans, using MPMHC to coordinate and obtain identical provisions and rates. *Id.* at ¶ 1. b (3).

C. Violations Relating to the Compliance Program

Paragraph VII(C) of the FCJ requires Morton Plant and Mease to brief their officers, directors, trustees, and administrators annually on the meaning and requirements of the FCJ, penalties for its violations, and their duties under the antitrust laws. Though the hospitals provided some form of briefing at various points after the entry of the FCJ, such briefings were perfunctory, and did not fully or adequately explain the requirements of the FCJ. *Id.* at ¶ 1. c (1).

Paragraph VII(D) of the FCJ requires Morton Plant and Mease to obtain from their respective officers and administrators an annual certification that s/he has read, understood, and agrees to abide by the FCJ and is not aware of any violations of this FCJ. While the hospitals obtained a form of compliance certification from the relevant individuals, these certifications did not always provide for the affirmation, required by the FCJ, that the individual was not aware of any violations of the FCJ. *Id.* at ¶ 1. c (2).

Paragraph VIII(B) of the FCJ requires Morton Plant and Mease to certify annually to the plaintiffs that they have each complied with ¶ VII's Compliance Program. The hospitals made these certifications, but did so improperly insofar as (1) they did not obtain the proper certifications from certain officers and administrators, and (2) they did not inform the plaintiffs of the violations they had discovered or reasonably should have discovered as early as 1996. *Id.* at ¶ 1. c (3).

II. THE PROPOSED ENFORCEMENT ORDER

The proposed Enforcement Order is designed to deter further violations of the FCJ by (a) penalizing those responsible; (b) changing the way Morton Plant, Mease, and MPMHC operate;

(c) requiring MPMHC to divest its outpatient clinics; and (d) imposing additional compliance requirements. The proposed Enforcement Order will constitute a full and complete disposition of the admitted violations of the FCJ, as outlined in ¶ 1 of the Motion and Stipulation for Entry of an Enforcement Order, barring further proceedings by the plaintiffs against Morton Plant, Mease, or MPMHC based upon or arising out of (i) the admitted violations, or (ii) those violations occurring before the entry of this Enforcement Order that were not known -- and which were not reasonably knowable -- by any current officer, director, trustee, administrator, or management employee of Morton Plant, Mease, or MPMHC. Proposed Enforcement Order, § II. The proposed Enforcement Order, however, does not limit the plaintiffs ability to prosecute any future violations, or any previous violations known -- or reasonably knowable -- to Morton Plant, Mease, or MPMHC that were not described in the Motion and Stipulation, nor does it affect the rights or remedies available to others.

A. Civil Penalty

The proposed Enforcement Order requires Morton Plant and Mease to reimburse the United States and the State of Florida \$96,000 and \$100,000, respectively, for fees and costs relating to the investigation. In addition, Morton Plant and Mease shall pay to the State of Florida (or its designee) a civil penalty of \$300,000 to be used for the provision of indigent health care service in the Pinellas County area. Of this amount, \$150,000 will be provided to the State of Florida for delivery to Greenwood Community Health Center, Inc.; \$75,000 will be provided to the State of Florida for delivery to the Homeless Emergency Project, Inc.; and \$75,000 will be

provided to the State of Florida for delivery to the Clearwater Free Clinic.³ Morton Plant and Mease are prohibited from exerting any influence over the money's use. The names of Morton Plant and/or Mease shall not be affiliated with the provision of health services which result from the payment of this penalty, nor shall the penalty be a deductible expense for purpose of calculating either Morton Plant's or Mease's taxes. *Id.* at § III.

B. Enforcement Provisions

The proposed Enforcement Order also requires significant changes in the structure of MPMHC and in the way Morton Plant and Mease conduct their business operations in order to eliminate mechanisms by which the FCJ was violated. Thus, since Morton Plant and Mease repeatedly violated the FCJ by misusing the “messenger model” for managed care contracting,⁴ the proposed Enforcement Order requires that they immediately cease the joint use of third-party messengers for contracting with any payer, and that all contracting with payers shall be conducted

³ The United States believes it is appropriate to allow its co-plaintiff, the State of Florida, to receive the entire amount of a civil penalty where the state has an independent claim to the damages and where the United States has not incurred any monetary loss in connection with the offending conduct. 4B U.S. Op. Off. Legal Counsel 684, 1980 WL 20970 (O.L.C.). In addition, in this instance, because the parties violating the decree are locally-based non-profit institutions and because the harm caused by the violations was local, the United States did not insist on a separate penalty. By deferring to the State of Florida in this instance, the United States believes that those most likely harmed by the violations will receive some restitution.

⁴ The Statements of Antitrust Enforcement Policy in Health Care, issued by the Department of Justice and the Federal Trade Commission in August, 1996, state that “messenger model arrangements” -- arrangements, for example, where the agent or third party conveys to the providers “all contract offers made by purchasers, and each provider then makes an independent, unilateral decision to accept or reject the contract offers” -- are not *per se* illegal price fixing where they do not result in a collective determination of prices or price-related terms. *See* Statement 9(C). Under the Policy Statements “the key issue is . . . whether the arrangement creates or facilitates an agreement among competitors on price or price-related terms.” *Id.* Lawful messenger arrangements facilitate contracting between providers and payers but do not result in agreements among competing providers on prices or price-related terms.

independently, without any coordination or joint action. *Id.* at § IV. A.

Moreover, since the violations may have tainted the hospitals' current payer contracts, the proposed Enforcement Order requires Morton Plant and Mease to notify all payers with which they contract of this proposed Enforcement Order and afford them an opportunity to terminate, on 30 days notice, any such contracts entered into, renewed, or amended since September 29, 1994, which are still in effect. The only exception is for those contracts negotiated on behalf of Morton Plant by BayCare Health System, Inc., as Mease is not a member. *Id.* at § IV. B.

In addition, Mease is required to terminate its membership in, and cease further contracting with payers through, BayCare Health Network, the local network of hospitals to which Morton Plant also belongs. Mease is also required to notify all payers with which it contracts through BayCare Health Network of this proposed Enforcement Order and afford them an opportunity to terminate, on 30 days notice, any such contracts which are still in effect.⁵ *Id.* at § IV. C

Finally, in order to address the violations associated with MPMHC -- in particular its direct sale of outpatient services -- the proposed Enforcement Order requires that MPMHC promptly divest its outpatient clinics, selling Eastlake Outpatient Center and Countryside Surgery Center to Mease, and selling Bardmoor Imaging Center, Diagnostic Imaging Center, Trinity Outpatient Center, Behavioral Health Management Services, Inc., The Harbor Behavioral Health

⁵ Morton Plant and Mease may, however, negotiate and contract with payers on a non-exclusive basis through the Morton Plant Mease PHO pursuant to the provisions of ¶ V(G) of the FCJ, provided that all such contracts shall be for both hospital and physician services and involve substantial risk sharing among participating physicians and hospitals, and provided further that any information provided to the PHO by one of the hospitals shall not be disclosed to the other hospital. *Id.* at § IV. D.

Care Institute, Inc., and those physician practices owned by the Partnership through Morton Plant Mease Primary Care, Inc. to Morton Plant. *Id.* at § IV. E. In the future, MPMHC may engage only in those activities expressly allowed in ¶ V of the FCJ, must cease all sales of patient care and administrative services to any purchasers other than Morton Plant and Mease (except those allowed under ¶¶ V(C) and II(A)(10) of the FCJ), and must take all other steps necessary to fully comply with the FCJ and the proposed Enforcement Order. *Id.*

C. Compliance Provisions

In addition to the structural and conduct changes described above, the proposed Enforcement Order requires both Morton Plant and Mease to augment their existing compliance programs and substantially increase their efforts to ensure compliance. Each hospital will be required to create an internal Compliance Committee to oversee and coordinate each entity's compliance with the FCJ and Enforcement Order, and to make the CAO of each hospital the Chair of each such Compliance Committee. Each will be required by the proposed Enforcement Order to create a written directive setting forth each hospital's policies regarding compliance with the FCJ and the Enforcement Order, including the potential disciplinary actions the hospital shall take in the event of a violation, and a description of the procedures to be followed to comply with the FCJ and the Enforcement Order. Each will be required to distribute to each officer, director, trustee, administrator, management employee, and anyone responsible for managed care contracting for each hospital a copy of the FCJ, the Enforcement Order, and the written directive setting forth the hospital's policies regarding compliance with the FCJ and the Enforcement Order. Each will be required to inform, in writing, each officer, director, trustee, administrator, management employee, and anyone responsible for managed care contracting for each hospital

that non-compliance with the FCJ or the proposed Enforcement Order shall result, in every instance, in disciplinary action, which may include dismissal, and that non-compliance may also result in conviction for contempt of court and imprisonment and/or fine. *Id.* at § V. (A)-(B).

The proposed Enforcement Order also requires that, within 30 days of the entry of the Enforcement Order, and annually thereafter, Morton Plant and Mease shall obtain from each officer, director, trustee, administrator, management employee, and anyone responsible for managed care contracting for each hospital a certification stating that s/he received, read, and understands his or her obligations under the FCJ, the Enforcement Order, and the written directive setting forth the hospital's policy regarding compliance with the Enforcement Order; that s/he has been advised and understands that non-compliance with the FCJ and/or the Enforcement Order shall result, in every case, in disciplinary measures, which may include dismissal, and that such non-compliance may also result in conviction for contempt of court and imprisonment and/or fine; and that s/he (a) is not aware of any violations of the FCJ or the Enforcement Order occurring after entry of the Enforcement Order or of any past violations not admitted to in the Motion and Stipulation for Entry of an Enforcement Order, or (b) promptly notified the Compliance Committee of any violations of which s/he has become aware. *Id.* at § IV. C. All such certifications shall be retained by Morton Plant or Mease, and be available for inspection pursuant to ¶ IX of the FCJ. *Id.*

The proposed Enforcement Order also requires both Morton Plant and Mease annually to submit to this Court, with copies to the plaintiffs, certifications signed under oath by each hospital's CAO that: (1) all steps required by the Enforcement Order and the FCJ have been accomplished; (2) the Compliance Committee has made a reasonable, good faith effort to

investigate any suspected violations of the Enforcement Order or the FCJ of which it has become aware; (3) s/he is not aware of, nor has been informed of, any violations of either the Enforcement Order or the FCJ other than those admitted to in the Motion and Stipulation for Entry of an Enforcement Order; and (4) each managed care contract entered into from the date of entry of the Enforcement Order, except those negotiated through the Morton Plant Mease PHO pursuant to ¶ IV. D of the proposed Enforcement Order, has been independently negotiated and priced, with no information shared between Morton Plant and Mease. *Id.* at § V. G. Any suspected violations are to be identified, and the nature of such suspected violations -- and any investigation conducted by the hospitals -- are to be described in the Certification. *Id.*

The proposed Enforcement Order also requires the Compliance Committee of each hospital to create an internal audit work plan outlining how the compliance audits are to be conducted and scheduling two internal compliance audits each year. Each Compliance Committee shall provide its work plan to the plaintiffs within 30 days of the entry of this proposed Enforcement Order and shall execute the internal audits as scheduled. In addition, each Compliance Committee shall file an affidavit summarizing the results of each audit with the plaintiffs within 14 days of the completion of each audit. *Id.* at § V. E.

Finally, no later than 30 days after the entry of the proposed Enforcement Order, Morton Plant and Mease shall each modify the training of all officers, directors, trustees, administrators, management employees, and anyone responsible for managed care contracting to include such training as may be required by the FCJ, the proposed Enforcement Order, and the directives of the Compliance Committee. *Id.* at § V. F. In addition, within 30 days after entry of the proposed Enforcement Order, Morton Plant and Mease must provide each payer with which it has a

contract or with which it enters negotiations for a managed care contract a copy of the FCJ, the Enforcement Order, and the hospital's written directive on compliance. *Id.* at § V. D.

D. Penalties for Future Violations

The proposed Enforcement Order further provides that if Morton Plant, Mease, or MPMHC violate the FCJ or the proposed Enforcement Order, the Court may impose a financial penalty in such amount as the Court deems reasonable, and that any such violation may be established by a preponderance of the evidence after notice and hearing. The purpose of this provision is to further deter violations of the FCJ and the proposed Enforcement Order by making clear that the Court may impose significant financial penalties based upon a showing that the FCJ or the Enforcement Order was violated. *Id.* at § VI.

E. Modification or Termination of the Enforcement Order and FCJ

The proposed Enforcement Order provides that, with one exception related to intervening changes in the law, Morton Plant and Mease may not seek to modify or terminate either this Enforcement Order or the FCJ until three years after the date that the Motion and Stipulation for Entry of an Enforcement Order is filed with the Court. *Id.* at § VIII. A. The Enforcement Order will otherwise terminate, along with the FCJ, on September 29, 2004.

F. Effect of Enforcement Order

The proposed Enforcement Order is intended to ensure Morton Plant's and Mease's full compliance with the FCJ and to make available civil penalties and other remedies for any future violation of the FCJ or this Enforcement Order. It does not limit, modify, or affect Morton Plant's or Mease's obligation to comply with all provisions of the FCJ. Consistent with that, the monitoring and visitation provisions of ¶ IX of the FCJ shall apply to the activities of Morton

Plant and Mease mandated under this Enforcement Order. *Id.* at §§ VII, IX.

The proposed Enforcement Order also provides that jurisdiction is retained by this Court for the purpose of enabling any of the parties to the Enforcement Order to apply to this Court at any time for further orders and directions as may be necessary or appropriate to carry out or construe it, to enforce compliance with it, and to punish of any violations of it. *Id.* at § X.

CONCLUSION

Although Morton Plant and Mease have repeatedly violated the FCJ, the United States and the State of Florida believe that the proposed Enforcement Order will make future violations less likely by making them more difficult to perform, easier to detect, and, once detected, more costly for the hospitals and their administrators. For that reason, the United States and the State of Florida request that this Court grant the Motion and enter the proposed Enforcement Order.

Respectfully submitted,

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